Filed 3/16/15 P. v. Karkehabadi CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MAHMOUD KARKEHABADI, Defendant and Appellant.	G048533 (Super. Ct. No. 10CF2204) O P I N I O N
In re MAHMOUD KARKEHABADI on Habeas Corpus.	G049581

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed.

Original proceedings; petition for a writ of habeas corpus, after judgment of the Superior Court of Orange County. Petition denied.

Bird & Bird and Karen Hunter Bird for Defendant, Appellant, and Petitioner.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant and appellant Mahmoud Karkehabadi (defendant) of: 24 counts of fraudulent offer, sale, or purchase of securities (Corp. Code, § 25401 (section 25401)); 24 counts of grand theft by false pretenses (Pen. Code, § 487, subd. (a) (section 487)); and one count of engaging in a fraudulent securities scheme (Corp. Code, § 25541 (section 25541)), all with sentence enhancement allegations based on the excessive amount of money taken (Pen. Code, §§ 186.11, subd. (a)(2), 1203.045).[1] The court sentenced defendant to a total term of 27 years in prison.

Defendant's appeal raises the following challenges: (1) denial of the right to present a defense; (2) insufficiency of the evidence; (3) prosecutorial misconduct; (4) judicial bias; (5) ineffective assistance of counsel; (6) instructional error; (7) sentencing error; and (8) cumulative error. We find no reversible error and affirm the judgment.

Defendant's petition for writ of habeas corpus expands upon his prosecutorial misconduct and ineffective assistance of counsel claims. Once more we find no reversible error, and thus deny the petition for writ of habeas corpus.

FACTS

Beginning in 2005, defendant, using the name Mike Karkeh, held himself out as the principal owner and Chief Executive Officer (CEO) of Alliance Group Entertainment, Incorporated (AGE), a California corporation, ostensibly in the movie making business. Also in 2005, Cho, the owner of Newport Coast Entertainment Corporation (NCEC), a marketing company, began seeking potential investors for AGE.

From 2005 to 2007, NCEC was the main contact for investors who wanted to invest in AGE. NCEC collected investor money and passed it on to AGE, minus sales commissions. NCEC used the Internet, advertisements in investment publications, and brokers like Salazar, to disseminate information about investing in AGE.

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[1] Codefendant Timothy Cho testified and was acquitted of all charges. Codefendant Deanna Ray Salazar pleaded guilty and testified for the prosecution at trial.

Many of the brokers and investors lived outside of California, and often did not interact with defendant directly. Instead, defendant gave Cho/NCEC information about AGE that was used in AGE promotional materials prepared by NCEC and disseminated to the brokers and investors. In addition, defendant occasionally spoke to individual investors and, depending on the amount of their potential investment, gave them tours of AGE's Burbank studio.

According to a prospectus produced by AGE and NCEC, the investors were offered the "opportunity to support the budgeted expenses incurred by AGE in the production of one or more motion picture projects." The investors were told the opportunity was "not a traditional equity investment in a particular motion picture, where your profitability is tied to the successful marketing and profitability of the individual motion picture over the life of the project." Rather, AGE would use invested funds to "maintain momentum . . . for AGE to prepare for and finance new projects."

Also according to the prospectus, AGE promised investors interest at a fixed rate on their one-year loans: either 18 percent if the investor opted for monthly interest payments; or 25 percent if the investor opted for a lump sum interest payment upon maturity. Investors were promised return of their principal when the loans matured, and told a completion bond ensured "if the production is not completed, [the] investors can redeem the [completion] bond for cash, subject to certain terms and conditions."

The prospectus further stated AGE fronted the cost of its movie productions, which meant that "[w]hen the investor capital is obtained, [AGE] uses it to replace the money they already have in the movie." Investors were assured AGE did not need "investor capital for current projects," and did not "re-leverage investor capital." They were told their investments were "backed by all of the business operations of AGE. AGE has many different streams of revenue . . . [AGE] has divisions encompassing many aspects of the entertainment industry . . . . All these different revenue streams can be utilized to pay the investor if the movie runs over budget during the investment term."

Moreover, the prospectus assured investors AGE had prior successful movie productions and experience because "AGE was originally part of Ron Shusett Productions, which has been in the motion picture business for more than 25 years." The prospectus identified several well-known movies purportedly produced by Ron Shusett Productions and included a chart which showed tremendous earnings from these movies. For example, the prospectus indicated the movie "Alien" reaped $183 million in gross revenues, which was "1,663.64" percent of the budget.

The only investment risk identified in the prospectus was the possibility that production costs would run significantly over budget. However, investors were also assured the completion bond would cover their investment, and the bond company employees would do everything possible to make sure the movies came in on budget. Finally, the prospectus indirectly reassured investors their investments were safe because they were permitted to invest money from their individual retirement accounts.

The investors were never told that: in 2003, the Los Angeles Superior Court enjoined defendant, then using the name Mike Kay, and his business, First National Credit, from committing unfair business practices (Bus. & Prof. Code, § 17200), and entered a $5 million civil judgment against them; also in 2003, the California Department of Motor Vehicles (DMV) revoked defendant's motor vehicles salesperson license; and in 2004, defendant filed for Chapter 7 bankruptcy protection.

Similarly the investors were never told that: in 2002, the Federal Trade Commission obtained a stipulated judgment against Cho and Tim Cho Investment Company, prohibiting misleading investment sales practices; in 2006, the Pennsylvania Securities Commission issued a cease and desist order, prohibiting Cho and NCEC "from offering and selling the Loan Agreement" used by NCEC and AGE in Pennsylvania; and in 2007, the California Department of Corporations issued a desist and refrain order (Corp. Code, § 25532) to Cho, NCEC, defendant and AGE, ordering them to stop offering or selling "investment contracts comprised of . . . movie production loans . . . ."

Between 2005 and 2006, many investors signed loan agreements with NCEC/Cho and AGE/defendant and invested amounts ranging from a few thousand to a few hundred thousand dollars. Some of these early investors were repaid in full at the end of their one-year investment periods. But these early investors were actually repaid with money from new investors, not revenue from films produced.

In November 2007, Cho ended NCEC's relationship with defendant and AGE. Thereafter, additional investors signed loan agreements with AGE/defendant and sent their money directly to AGE. Later, defendant formed Film Projects, LLC (Film Projects), as a successor to AGE.

When AGE/Film Projects could not repay existing investors and could not find new investors, defendant sent letters to the existing investors asking them to reinvest their loans in new movie projects or to extend the maturity of their loans. Defendant then attempted to unilaterally modify their loans by sending promissory notes for the amounts of their investments but with smaller returns that would not be fully repaid until 2019.

Ultimately, between September 2006 and April 2009, more than 20 named investors loaned AGE/Film Projects approximately $3 million. AGE/Film Projects also received approximately $6.5 million more from other, unnamed investors. During this time, AGE/Film Projects paid approximately $1.7 million to various members of defendant's family, and defendant authorized AGE/Film Projects to spend over $10 million producing films, but he collected only slightly more than $800,000 in revenue.

Numerous victims testified defendant, either personally or through sales people, misrepresented AGE's company history, stability, and profitability when soliciting their investments. Specifically, he misrepresented their loans were risk free by falsely stating they were secured and guaranteed under completion bonds for each film, which AGE never purchased; by falsely leading them to believe AGE's film projects were fully funded and backed by AGE's expertise and financial security; and by not disclosing early investors were paid with later investors' money, not movie revenue.

At the same time, defendant did not use his legal name on company documents or Web sites, and failed to disclose the $5 million civil judgment against him, his personal bankruptcy, and the revocation of his DMV salesperson's license. Finally, Cho failed to disclose the Pennsylvania Securities Commission's cease and desist order against him, and the 2002 stipulated judgment in favor of the Federal Trade Commission.

In his defense, defendant emphasized AGE actually made four movies and they generated some distribution revenue. He also stressed AGE did not directly pay his personal expenses, and he did not flee with the investors' money or otherwise misappropriate their funds to buy expensive items like cars or homes. Lastly defendant relied on the testimony of finance expert witnesses to argue AGE did nothing unusual with its financing, but instead the investors knowingly entered into risky investments.

DISCUSSION

APPEAL

1. Court Denial of Right to Present Defense

Defendant asserts the court erroneously excluded evidence AGE was placed in receivership and movie distribution revenue was held by the receiver, and thereby deprived him of the constitutional right to present a defense. We disagree.

a. Procedural History

In September 2012, more than two years after the complaint was filed in this case, the court granted the prosecution's unopposed petition to have defendant's assets brought under the control of a receiver in order to preserve them for payment of victim restitution. (Pen. Code, § 186.11, subd. (d)(2).) At that time defendant also agreed to an order that funds owing to AGE/Film Projects be delivered to the receiver.

Before trial, the prosecution filed a motion in limine seeking to exclude evidence of the receivership under Evidence Code section 352. Defendant opposed the motion, arguing evidence that AGE produced four films which had value and continued to generate revenue after the appointment of the receiver, was relevant to his intent.

After hearing the arguments of counsel, the court ruled, "There should be no reference to the receivership by any counsel without leave of the court." However, the court also indicated evidence that AGE made four movies which had value and continued to generate revenue was relevant and admissible. Thus, the court's ruling only excluded evidence concerning and references to the existence of the receivership itself.

The receivership ruling came up later, during cross-examination of investor Gerald Taback. Cho's attorney, Michael Molfetta, asked the witness, "Is it fair to sum up your testimony you felt that the reason you hadn't gotten paid [is] because the whole deal was a scam, right?" Taback said yes, which prompted Molfetta to ask, "Would it change your opinion as to that, that you didn't get paid, therefore, it's a scam. Would it contribute to your opinion or in any way alter it, that one of the reasons you didn't get paid may very well have been that the business was shut down?" The prosecutor objected on grounds the question was argumentative and called for speculation. The court sustained the objection, but did not specify the grounds at that time.

After a short recess, the court and counsel met without the jury. Molfetta, referring to the prosecutor's use of the phrase Ponzi scheme during opening statement, urged the court to reconsider its earlier ruling excluding evidence of the receivership. He claimed "[a] Ponzi scheme, by definition is the selling of an illusion. It's air. [¶] I believe it's directly relevant not only to show that these movies were made, not only to show that these movies make money. I believe counsel has opened the door to receivership issue completely."

The prosecutor responded, "A Ponzi scheme is not air. A Ponzi scheme means that someone is using later investor money to pay earlier investor[s]." The prosecutor represented the evidence would show AGE continued to seek investors, even after the desist and refrain order had been issued, and AGE only ceased operating when there was "no money to pay anybody."

Molfetta argued an investors' opinion of whether fraud occurred was relevant, and that he needed to ask the witnesses' if their opinion of AGE would change if they knew AGE had been shut down by the government. The court observed that the witnesses' opinion of whether there had been a fraud was not relevant to any issue, and the court then reaffirmed its earlier ruling excluding evidence of the receivership itself.

Still later in the trial, Robert Armendariz, another investor, also expressed his opinion that the letters from AGE and Film Projects changing the terms of their loans were just worthless pieces of paper. On cross-examination, defendant's attorney, Robert Weinberg, asked Armendariz if he was "aware that [Film Projects] owns those four movies and half a million dollars is sitting in the bucket waiting to be distributed."

The prosecutor objected on Evidence Code section 352 grounds, moved to strike, and asked for a sidebar. The court sustained the objection and said, "Question is stricken. I'll see counsel at sidebar." There was an unreported sidebar discussion between the court and counsel, after which Weinberg resumed cross-examination on other subjects. After Armendariz was excused, the court recessed for the day.

The following morning, the court held proceedings without the jury to address, among other things, the previous evening's unreported sidebar discussion. In relevant part the court stated, "We had a brief sidebar conference. The court had sustained an objection in relation to a question which [defense counsel] had asked that assumed facts which were – are not in evidence before the jury, and the court sustained the objection. After hearing from counsel that ruling stood." The court asked if the parties wanted to put anything on the record, and Weinberg indicated, "Yes, if I might."

Weinberg first complained the prosecutor had been able to characterize his client as the owner of AGE without any foundation. The court pointed out that defendant held himself out as the CEO/president of AGE in numerous items of company correspondence. Weinberg argued the position CEO is not synonymous with the word "owner" for some time before shifting back to the topic of the receivership.

Regarding the receivership, Weinberg remarked, "What I'm doing is merely repeating the assertions of the prosecutor when she acknowledges that when she got a receiver in her own statements under oath, a half a million dollars plus happened to be in accounts that represent movie income. And this witness is being prompted by her to make a statement such that, I knew this new LLC was a worthless piece of paper.

"What's the result? I am suppressed from getting out a fact that goes directly to the intent of my client and Mr. Cho to defraud. Whether they intended to defraud is the very issue in the case.

"[¶] . . . [¶]

"I've already promised the jury in my opening statement I would have a CPA to show how millions of dollars were spent, not on yachts, not on Rolexes, not on limousines, not on trips to Vegas. Oh, no, on making movies, paying actors, music, post production."

Weinberg asserted AGE continued to receive "payments . . . all the way into 2010 under the new [Film Projects] LLC." He accused the prosecutor of trying to suppress evidence a receiver had been appointed, and claimed there would be "a miscarriage of justice" if the court excluded evidence of the AGE receivership.

Molfetta, then moved for a mistrial, claiming, "The defense has been frankly shackled by the court's [receivership] ruling. The prosecutor has gone on ad nauseam about subsequent conduct which will show an intent to defraud. [¶] We've been asking to go into a very specific area which says, frankly, you paid us to do something, not only did we do it but we did it successfully. . . ."

After further argument, the court denied Cho's mistrial motion.[2]

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[2] Defendant asserts Cho's mistrial motion should have been granted. Because this assertion is unsupported by authority, reasoned argument, or citations to the record, it need not be considered. (*People v. Islas* (2012) 210 Cal.App.4th 116, 128 (*Islas*).)

The receivership ruling came up again during the testimony of Carl Richard, a Department of Justice investigative auditor. Richard said he started investigating AGE, NCEC, defendant, and Cho in 2007. Richard testified AGE received a little more than $500,000 in total movie distribution revenue while spending about $10 million, and that all of AGE's expenses had been funded with investor money. Richard also stated AGE had $401,000 in cash at the end in 2010, but this amount was offset by the unpaid costs of movies in progress. Accordingly, AGE was not a profitable venture.

During cross-examination, Weinberg asked Richard, "Are you aware as you sit here now whether the distributor of these movies owes [AGE] or Film Projects, LLC money?" The prosecutor objected on Evidence Code section 352 grounds. The court *overruled* the objection, and Richard testified he was unaware of any such money owed.

Outside the presence of the jury, the court and Weinberg engaged in the following colloquy: "Mr. Weinberg: I want to see if I understand this right. They seize the business, they call a witness to say the business isn't profitable. And I just want to find out if this witness, who's their expert, is aware of any other income due and owing to this business. And I'm being told I'm violating a court order. [¶] The court: The reference was receivership. [¶] Mr. Weinberg: I didn't use the word receivership. [¶] The court: I'm just. That was the reference."

After further discussion, the prosecutor represented that a mere $3,000 was left in one AGE account frozen as the result of the receivership, and she was not aware of any movie distribution revenue coming into the AGE receivership.

The court noted the defense had repeatedly tried to elicit evidence about movie distribution income supposedly held by the receiver, but no one had yet introduced any evidence the receiver ever held any such income. Nevertheless, the court *allowed* both defense attorneys to question Richard about his knowledge of any movie distribution income purportedly still owed to AGE. Richard, again, testified he had not seen any documents related to any AGE income supposedly owed or paid after 2010.

b. Standard of Review and Analysis

We review a trial court's evidentiary rulings for abuse of discretion. (*People v. Vieira* (2005) 35 Cal.4th 264, 292.) Here, evidence that defendant's assets were controlled by the receiver after September 2012 was arguably irrelevant, because it had no discernable tendency in reason to prove or disprove any element of the charged offenses based on defendant's conduct prior to August 2010. (Evid. Code §§ 210, 350.)

Further, even if it was marginally relevant, the probative value of that evidence was substantially outweighed by the probability that its admission would "(a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code § 352.)

Moreover, as the court ruled, Weinberg's question about the "half a million dollars . . . sitting in the bucket waiting to be distributed" did assume facts not in evidence. No party had offered evidence of any AGE money held after the receiver was appointed in 2012. Finally, defendant was free to proffer evidence showing AGE's films continued to generate income after the receiver was appointed—he simply failed to do so.

The court did not abuse its discretion or deprive defendant of any defense.

2. Sufficiency of the Evidence

Defendant challenges the sufficiency of the evidence generally with respect to all counts, and specifically with respect to certain counts. We reject these challenges.

a. Standard of Review

"'To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1077.) The standard of review is the same in cases like this in which the prosecution relies mainly on circumstantial evidence. (*People v. Snow* (2003) 30 Cal.4th 43, 66.)

b. General Challenges to the Sufficiency of the Evidence

Defendant was convicted of three crimes which are similar and share common elements: fraudulent offer, sale, or purchase of securities in violation of section 25401; grand theft by false pretenses in violation of section 487; and engaging in a fraudulent securities scheme in violation of section 25541. For each of these crimes, the prosecution was required to prove that defendant, as a perpetrator or as an aider and abettor or coconspirator, with the intent to defraud, knowingly made false statements of material fact or omitted to state material facts in the sale of a security, and that the investors relied on defendant's false statements or omissions when deciding to invest in AGE. (See Special Instruction Nos. 1 & 3, & CALCRIM No. 1804.)

Defendant first asserts there is no evidence he knowingly made false statements of material fact or omitted to state material facts in the offer for sale of a security. But the jury concluded otherwise, and our standard of review is deferential.

"'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt.'" (*People v. Stanley* (1995) 10 Cal.4th 764, 792-793.) Accordingly, we must affirm if the circumstances reasonably justify the jury's finding of guilt regardless of whether the circumstances might also reasonably be reconciled with a contrary finding. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Thomas* (1992) 2 Cal.4th 489, 514.)

In this case, the circumstances reasonably justify the jury's finding of guilt. The prosecution introduced circumstantial evidence of defendant's knowledge and intent through: the prospectus used to solicit the loans; the loan agreements themselves, which defendant signed; the testimony of the investors as to what was promised to them; numerous financial documents, including bank account records for defendant, his family members, and AGE; and the testimony of Cho and Salazar. This evidence is sufficient.

Defendant next disputes his liability as a perpetrator, minimizing his personal involvement in selling the loans, but failing to mention the prosecution also pursued him as an aider and abettor and as a coconspirator. Thus, he implicitly concedes his liability as an aider and abettor and as a coconspirator. And, as we will now explain, defendant is also liable as a perpetrator because a principal is responsible for the acts or omissions of his agents. (*People v. Williams* (2004) 118 Cal.App.4th 735, 743-745.)

Special Instruction No. 12 advised the jury: "A person who causes a crime to be committed through the instrumentality of an agent, employee, or other person, is a principal in the crime. [¶] 'The term "agent" means one who acts for or in place of another by authority from the other. . . . [¶] 'Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control and consent by the other so to act. The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act in his behalf and subject to the principal's control. In the absence of the essential characteristic of the right to control, there is no agency. [¶] 'Where a principal directly authorizes or otherwise causes a crime to be committed through the instrumentality of an agent, the law holds the principal responsible for the acts of the agent as though he personally committed them.'"

In light of this instruction, defendant asserts Cho, NCEC, and the brokers were not his agents. However, defendant provided the false information they used to peddle investments in AGE, while withholding negative information about himself and AGE. Defendant also claims he could not, and did not, control the words used by the brokers. True, the investors testified to slightly different presentations by the brokers, but regardless, the prospectus and loan agreements offered the same deal: a one-year loan at either 18 or 24 percent with little or no risk. On this record, there is sufficient evidence to support the jury's implied finding Cho, NCEC, and the brokers were defendant's agents.

Next, apparently attempting to argue the loans were not securities within the meaning of sections 25401 and 25541, defendant points to a memorandum from attorney Stanley Arouty to AGE which states: "The jurisdiction of the SEC and their rules and regulations do not apply to loan agreements, such as the one attached hereto." This argument is a nonstarter.

"The term 'security' includes *any note*, stock, treasury stock, bond debenture, evidence of indebtedness, . . . *investment contract*, [and] certificate of deposit for a security . . . . [¶] 'Security' also includes an investment contract. An investment contract is a transaction in which a person entrusts money or other capital to another, with the expectation of deriving a profit, income or some financial benefit from a business enterprise, the failure or success of which is dependent upon the managerial efforts of other persons." (Special Instruction No. 4, italics added.)

With respect to reliance, defendant suggests the investors bore the burden of searching public records for information relating to him and AGE before investing. Defendant cites no pertinent legal authority for this notion. Moreover, defendant did not use his full legal name in connection with AGE, which would have hindered any investor's attempt to learn about defendant's past or current financial condition.

Finally, defendant claims none of the facts he omitted to tell the investors were material. Once more we disagree. "A fact is material if there is a substantial likelihood that, under all the circumstances, a reasonable investor would consider it important in reaching an investment decision." (Special Instruction No. 7.) Here, a reasonable investor would likely consider the $5 million judgment against defendant, his prior bankruptcy, and his other legal problems important in deciding to invest in AGE. This evidence alone is sufficient to support the jury's implied finding of materiality.

For all of these reasons, we reject defendant's general contentions there is insufficient evidence he knowingly made false statements of material fact or omitted to state material facts in the offer for sale of a security on which the investors relied.

c. Count Specific Challenges to the Sufficiency of the Evidence

i. Counts 5, 6, 11, 12, 15, 16, 27, and 28

With respect to counts 5, 6, 11, 12, 15, 16, 27, and 28, defendant contends the named investors, Li Yang Feng, Jianling Wu, Anton Martin, and Ronald Dudeck, received no communications from anyone except family members. Consequently, he asserts, the evidence is insufficient to support these counts. We disagree.

Defendant supplied his agents with the information that trickled down to and through several families. Some members of these families sought further information directly from AGE, NCEC, or the brokers, and some simply relied on the communications to their family members. In either case, defendant was the ultimate source of the material misrepresentations and omissions concerning AGE.

Defendant argues the prosecution failed to present sufficient evidence he communicated an untrue statement of material fact or omitted to state a material fact, again pointing to the omitted facts relied on by the prosecution and asserting these facts were not material to the investors. As noted above, the evidence is sufficient to support the jury's implied finding of materiality.

Defendant then claims the investors relied on their relationships with their sales broker, not any representations he made. Again, defendant ignores his principal liability for the criminal acts of his agents. Further, to establish criminal fraud, it must appear that the victim relied in fact on the defendant's false representations or material omissions i.e., that "'the false representation "materially influenced" the owner's decision to part with his property.'" (*People v. Miller* (2000) 81 Cal.App.4th 1427, 1440-1441, quoting *People v. Wooten* (1996)44 Cal.App.4th 1834, 1842-1843.) However, a defendant's misrepresentations "'need not be the sole factor motivating the transfer.'" (*Miller*, at p. 1441.) There only need be a "'"causal connection shown between the [representations] alleged to be false" and the transfer of property.'" (*Ibid.*)

Here, the evidence links defendant to the misrepresentations made by the brokers in persuading the investors to part with their money. The fact this information was relayed by some investors to other potential investors does not relieve defendant of liability because there is a causal connection between the information he provided and their investments. Consequently, there is sufficient evidence of the requisite causal connection between the material misrepresentations and omissions and the individual investor's decisions to invest in AGE.

ii. Count 49

With respect to count 49, defendant challenges the sufficiency of the evidence to prove he violated section 25541, which prohibits the willful employment, directly or indirectly, of "any device, scheme, or artifice to defraud in connection with the offer, purchase, or sale of any security . . . ."

After instructing on the elements of the offense, the court also defined the terms "security," "investment contract," "offer," "sale," "material fact," and the phrase "device, scheme, or artifice." And for the latter, the court instructed, "the words 'device, scheme, or artifice mean any deliberate plan of action [or] course of conduct by which someone intends to deceive or to cheat another [or] by which someone intends to deprive another of something of value."

Here again, defendant and his agents misrepresented the financial condition and past successes of AGE, and the existence of completion bonds as security, and failed to disclose the fact that early investors had been repaid with new investors' money and not with movie distribution income. In addition, defendant failed to disclose his true name, the $5 million judgment against him, and the loss of his DMV sales license, information material to the proper consideration of any investment in defendant's company.

Based on this record, we conclude a reasonable juror could have found sufficient evidence defendant defrauded his investors by employing a "device, scheme, or artifice." Therefore, the evidence is sufficient to prove he violated section 25541.

iii. Counts 11, 12, 15-18, and 62-65

Defendant challenges the sufficiency of the evidence to prove counts 11, 12, 15, 16, 17, 18, 62, 63, 64, and 65. Specifically, he claims the court violated his Sixth Amendment right to confront and cross-examine adverse witnesses by not forcing the prosecution to call the victims named in these counts, and by instead allowing the prosecution to prove these counts through the testimony of other family members.

True, the prosecution did not call each victim as a witness. However, as the Attorney General emphasizes, the court permitted some family members to testify about transactions victimizing other family members, because those other family members were either too old or infirm to travel to California for trial. In these cases, the testifying family member described the nontestifying family members' actions, but not their statements. Thus, there was no violation of defendant's Sixth Amendment rights. (See *Crawford v. Washington* (2004) 541 U.S. 36, 53-54, 68.)

iv. Counts 17-20, 23-26, 33-38, 41, and 42

Defendant argues the prosecution failed to prove the crimes alleged in counts 17, 18, 19, 20, 23, 24, 25, 26, 33, 34, 35, 36, 37, 38, 41, and 42 were committed within California's jurisdiction, because both the brokers and the named investors resided out of state. We are not persuaded.

"If the crime is one over which California can and does exercise its legislative jurisdiction because it was committed in whole or in part within the state's territorial borders, California courts have jurisdiction to try the defendant. [Citation.] " (*People v. Thomas* (2012) 53 Cal.4th 1276, 1282.)

The evidence shows defendant and his agents including Cho sold investments in AGE, a California corporation doing business in California. Furthermore,

defendant and Cho both resided in California during the relevant time periods. These facts alone are sufficient to establish subject matter and personal jurisdiction to prosecute these crimes in California, regardless of where the brokers and named investors lived.

v. Counts 9-12

Defendant maintains the crimes alleged in counts 9, 10, 11, and 12 constitute a single investment and, therefore, the evidence supports only one securities fraud conviction and one grand theft conviction, not two of each. Not so. The named victim in these four counts, David Mueller, testified he made two separate $10,000 loans, and he signed two separate loan agreements at two different interest rates. Hence, while these were two investments by one investor, defendant was properly convicted of one securities fraud and one grand theft for each investment. (Pen. Code, § 954.)

vi. Counts 5 and 6

Defendant argues the investments which form the basis for counts 5 and 6 were made after he told the broker, Salazar, not to solicit any more loans in California due to the May 2007 desist and refrain order. Essentially he argues Salazar was no longer his agent after May 2007. This argument is unavailing.

Salazar testified defendant told her to stop soliciting investments in California, but he did not tell her to stop soliciting investments in other states. Rather, with defendant's knowledge, Salazar continued to solicit investors outside California, and she completed deals with at least two out-of-state investors after her conversation with defendant. Thus, substantial evidence supports counts 5 and 6.

3. Prosecutorial Misconduct

Defendant claims the prosecutor engaged in multiple acts of misconduct during the trial. This claim is unfounded. In general, "'"'[a] prosecutor's . . . behavior [only] violates the federal Constitution when it comprises a pattern of conduct so "egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal

trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citation.]" (*People v. Navarette* (2003) 30 Cal.4th 458, 506.)

Additionally, "'In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review.' [Citation.] When a claim of misconduct is based on the prosecutor's comments before the jury, "'the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.'" [Citations.]" (*People v. Friend* (2009) 47 Cal.4th 1, 29, 97.)

Defendant did not object in the trial court to many of the prosecutor's acts which he now asserts were improper, and nothing in the record suggests an objection would have been futile, or an admonition inadequate to cure any harm. Accordingly, many of these claims have been forfeited. (*People v. Linton* (2013) 56 Cal.4th 1146, 1205; *People v. Tully* (2012) 54 Cal.4th 952, 1011.) Nevertheless, we address all of these claims on the merits in light of defendant's alternative claim that his trial counsel's failure to object constituted ineffective assistance of counsel.

a. Evidence Presentation Issues

Defendant asserts the prosecutor engaged in misconduct while questioning Kirk Wallace, an expert witness from the Department of Corporations. This assertion is not supported by the record. Defendant first claims the prosecutor violated a pretrial order limiting the testimony of Wallace, but he has not directed our attention to any such pretrial order and our review of the record reveals none. Furthermore, while there was a mid-trial ruling limiting the testimony of Wallace, that order was not violated.

On direct examination, the prosecutor attempted to ask Wallace what constitutes a material omission. The defense objected. After some discussion, the court ruled Wallace could not testify what constitutes a material omission, noting the question

was one which was within the sole province of the jury. During the remainder of Wallace's testimony, the prosecutor adhered to the court's ruling. Consequently, there was no misconduct during the prosecutor's questioning of Wallace on this point.

Defendant next implies the prosecutor engaged in misconduct while questioning Wallace about documents he reviewed before testifying. According to defendant, the prosecutor's intent in asking these questions was to improperly elicit information the Attorney General had previously prosecuted defendant, as had the DMV.

The record reveals no misconduct by the prosecutor in asking these questions. But even assuming there was misconduct, there was no prejudice because, as defendant concedes, the defense objected to the prosecutor's questions on this topic, and the court sustained the objections and struck the disputed testimony.

Defendant objects, for the first time on appeal, to various exhibits the prosecutor prepared and the court admitted into evidence, and to various questions the prosecutor asked and the witnesses answered. All of these objections are untimely, and thus have been waived.

Even so we have considered all of these objections and found no instance in which the prosecutor presented an exhibit knowing it to be false or misleading. In fact, the record discloses no pervasive pattern of misconduct regarding the prosecutor's preparation and presentation of exhibits, or her questioning of witnesses.

b. Closing Argument Issues

Defendant contends the prosecutor improperly argued facts not in evidence, mischaracterized the evidence, invoked the jury's passion or prejudice, commented on defendant's failure to testify, and misstated the law. Although some of these contentions are unsupported by authority, reasoned argument, or citations to the record, and need not be considered (*Islas*, *supra*, 210 Cal.App.4th at p. 128), we address them all.

We consider the challenged statements in context, and in consideration of the argument as a whole. (*People v. Cole* (2004) 33 Cal.4th 1158, 1203.) We do not

lightly infer the jury drew the most damaging meaning from the prosecutor's statements. (*People v. Shazier* (2014) 60 Cal.4th 109, 144; *People v. Dykes* (2009) 46 Cal.4th 731, 771-772.) With these principles in mind, we turn to defendant's specific contentions.

i. The $5 Million Civil Judgment Against Defendant

Defendant maintains the prosecutor improperly referred to the $5 million civil judgment against defendant during her closing argument, in violation of a pretrial order that precluded reference to the fact that it involved fraud and was obtained by the Attorney General's office, the same agency which prosecuted this case. But defendant misapprehends the scope of the pretrial order in question. That order was made for purposes of opening statements only, not for all purposes at trial.

Later, the court reviewed the actual judgment in the prior case, and redacted irrelevant portions, but admitted the redacted judgment as exhibit No. 3. The redacted judgment reveals the plaintiff in that case was "the People of the State of California, by and through the Attorney General, Bill Lockyer." It also contains multiple references to "fraudulent business acts or practices." Finally, it confirms defendant was ordered to pay a civil penalty in the sum of $5 million.

Thus, it was entirely proper for the prosecutor to argue in closing, "[Defendant] had a $5 million judgment against him by the State of California [in] March of 2003, ladies and gentlemen. Take a look at it. It's exhibit No. 3. This document right here. This is for fraudulent and deceptive practices." Likewise, it was proper for the prosecutor to argue in rebuttal, "Information like, a $5 million judgment. Not just some lawsuit, ladies and gentlemen, a $5 million judgment for fraudulent and deceptive practices. . . . A government action for fraudulent and deceptive practices."

ii. Facts Not In Evidence and Mischaracterized Evidence

Defendant claims the prosecutor argued facts not in evidence or mischaracterized the evidence 20 times. We are unconvinced. All of the challenged arguments are based directly upon the evidence in the record, or upon reasonable

inferences which may be fairly drawn from the evidence in the record. The mere fact there may be other evidence in the record or that other reasonable inferences may be fairly drawn from the evidence in the record does not render these arguments improper.

Furthermore, the jury was given CALCRIM No. 200, which directed them to "decide what the facts are." Thus, even assuming the prosecutor misstated or mischaracterized the facts during argument, "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions. [Citation.]" (*People v. Sanchez* (2001) 26 Cal.4th 834, 852 (*Sanchez*).)

iii. Appeal to Passion or Prejudice

Defendant claims the prosecutor's use of terms like "retirement fund," "nice elderly gentleman," "lovely lady," "nice cars," "fancy houses," and "Ponzi scheme," improperly encouraged the jury "to view the victims with compassion in their plight" and described "the defense in terms which struck fear and loathing in most people." Again we find no misconduct. "Prosecutors are given '"'"'wide latitude'"'"' in trying their cases. [Citation.]" (*People v. Caldwell* (2013) 212 Cal.App.4th 1262, 1269.)

Further, "In considering prejudice 'when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]' [Citation.]" (*People v. Caldwell, supra*, 212 Cal.App.4th at p. 1269.) Here, defendant fails to demonstrate a reasonable likelihood the jury improperly focused on the challenged terms.

Finally, CALCRIM No. 200 specifically instructed the jury not to let bias, sympathy, prejudice, or public opinion influence their decision. We presume the jurors followed this instruction. (*Sanchez*, *supra*, 26 Cal.4th at p. 852.)

iv. Comment on Defendant's Failure to Testify

Defendant argues the prosecutor improperly commented on his failure to testify or deny guilt. Specifically, he cites the following two passages from the

prosecutor's closing argument: "There's no testimony or any documentation to suggest that anyone other than [defendant] was in charge at Alliance Group Entertainment," and "There's nothing to suggest that anyone else is in charge at that point either which comes much later." We see nothing improper in these comments.

"In *Griffin v. California* (1965) 380 U.S. 609, the United States Supreme Court held that the prosecution may not comment upon a defendant's failure to testify in his or her own behalf. Its holding does not, however, extend to bar prosecution comments based upon the state of the evidence or upon the failure of the defense to introduce material evidence or to call anticipated witnesses. [Citations.] Nonetheless, "a prosecutor may commit *Griffin* error if he or she argues to the jury that certain testimony or evidence is uncontradicted, if such contradiction or denial could be provided *only* by the defendant, who therefore would be required to take the witness stand. [Citations.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339.)

Nothing in the record before us suggests defendant and no other person had knowledge of AGE's corporate structure such that his testimony was the only source of information about who was in charge. And, the prosecutor's point was well taken. While defendant repeatedly tried to distance himself from the actions taken by other people on AGE's behalf, he did not produce any evidence which contradicted the prosecution's proof defendant was in charge. In short, the prosecutor's references were fair comment on the state of the evidence and not on defendant's right to remain silent.

v. Misstatement of the Law

Defendant claims the prosecutor misstated the law and misled the court by arguing, "The standard of materiality is, what would a reasonable investor want to know when making an investment decision? That's the plain and simple, it's right out of the code." Again, we find no misconduct. As noted in *People v. Butler* (2012) 212 Cal.App.4th 404, 421 (*Butler*), """[a] fact is material if there is a substantial likelihood that, under all the circumstances, a reasonable investor would consider it important in

reaching an investment decision.””” When dealing with omissions of material fact, a violation of section 25401 occurs if the omission of the material fact renders the facts that were stated untrue or misleading. (*Butler*, at p. 421.) Hence, the prosecutor’s description of materiality was not a misstatement of the law.

Even assuming otherwise, the court also instructed the jury on the elements of a section 25401 offense, and further instructed the jury to “follow the law as I explain it to you, even if you disagree with it” or if it conflicts with “the attorney’s comments.” Again, we must presume the jury followed these instructions. (*Sanchez, supra*, 26 Cal.4th at p. 852.) Defendant fails to rebut this presumption or establish a reasonable likelihood the jury misapplied these instructions as he suggests. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72-73; *People v. Clair* (1992) 2 Cal.4th 629, 663.)

c. Sentencing Hearing Issues

Defendant avers that during the sentencing hearing the prosecutor misstated his prior criminal record and improperly referred to a case then pending against him in the Los Angeles Superior Court. He relies in part on the prosecutor’s comments to the court: “Your Honor, the only factor in mitigation with respect to [defendant], I even cited it in the probation report, is the fact that he does not have a record; however, [defendant] does have a fairly long criminal history, your Honor.”

The prosecutor’s reference to defendant’s “fairly long criminal history” appears related to defendant’s history of civil fraud, not actual criminal convictions. In any event, at the beginning of the sentencing hearing, before either counsel argued their respective positions, the judge stated he had read the 32-page probation report, which revealed defendant had no prior criminal convictions; three addendums to the report submitted shortly before the hearing; several victim impact statements and two letters from victims; defendant’s statement in mitigation with supporting exhibits; and the district attorney’s statement in aggravation. Nothing in the record suggests the court

disregarded all of this information and focused instead on the prosecutor's inapt statement about defendant's criminal history or pending case.

Lastly, the same judge who sentenced defendant presided over the trial, and of course that judge was well aware of the evidence presented. Thus, any misstatement by the prosecutor about defendant's prior criminal record or pending case was harmless.

d. Prosecution Denial of Right to Present Defense

Finally, defendant asserts, the prosecutor continually objected to questions which involved subsequent actions of defendant and thereby denied him his right to present a defense. Defendant cites only to page 607 of the reporter's transcript, and asserts the prosecutor's objections exacerbated the prejudice he suffered as a result of the court's pretrial ruling excluding references to the receivership. Then again, as noted above, evidence of the receivership was irrelevant and inadmissible. In spite of this, we have carefully reviewed page 607 of the reporter's transcript and found no prosecutorial misconduct or inappropriate objections with regard to this topic or any other.

In short, defendant's prosecutorial misconduct claims are unfounded.

4. Judicial Bias

Defendant claims the court was biased and used unfair trial procedures which deprived him of his constitutional rights to due process and a fair trial. (See, e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309; *People v. Brown* (1993) 6 Cal.4th 322, 333.) Defendant advances these claims under five general headings: (1) failure to rule on objections and motions; (2) failure to allow argument on legal issues; (3) failure to strike expert testimony on an issue of law; (4) personal attacks on the defense attorney; and (5) denial of his defense by limiting the expert witnesses' hours. We address each of these claims in turn and conclude none has merit.

First, defendant takes exception to the court's conduct of the trial because "[n]umerous motions and objections were taken 'under submission' and then never ruled on." (Boldface omitted.) He also asserts that "[o]n numerous occasions throughout the

trial, the court heard objections and failed to rule." He lists several specific instances where the court made in limine rulings which never resulted in a final ruling because the subject never came up during the trial. This claim is based upon a fundamentally mistaken understanding about the nature of in limine rulings.

"Generally when an *in limine* ruling that evidence is admissible has been made, the party seeking exclusion must object at such time as the evidence is actually offered to preserve the issue for appeal. [Citations.] The reason for this rule is that until the evidence is actually offered, and the court is aware of its relevance in context, its probative value, and its potential for prejudice, matters related to the state of the evidence at the time an objection is made, the court cannot intelligently rule on admissibility." (*People v. Jennings* (1988) 46 Cal.3d 963, 975-976, fn. 3.)

From our review of the record, the court correctly permitted the parties to argue their respective positions about the admissibility of certain evidence before trial, and then submitted these matters subject to further consideration in light of later events during trial. As noted, there is nothing improper about the court reserving a final ruling unless and until the relevance and materiality of the evidence became clear.

Defendant also complains about two other instances, one where the court sustained a defense objection but allowed the prosecutor to conduct further research on the issue, and the other where the court permitted the prosecutor to use a document during questioning of a witness. Neither of these actions was improper and neither evidences judicial bias. Plus, adverse rulings alone, even if incorrect, generally will not support per se reversal based on a claim of judicial bias. (See, e.g., *U.S. v. Gallagher* (1978) 576 F.2d 1028, 1039.)

Besides, absent any evidence of a preexisting extrajudicial bias, a claim of judicial misconduct requires a showing the court's actions at trial were so egregious and pervasive that the conduct "transgress[ed] the limits of fundamental fairness" and thereby distracted the jury "from a conscientious discharge of [its] responsibility to find the facts,

apply the law, and reach a fair verdict," such "that public confidence in the impartial administration of justice was seriously at risk." (*Daye v. Attorney General of State of N.Y.* (2d Cir. 1983) 712 F.2d 1566, 1571-1572.) Defendant's complaints do not reveal any judicial misconduct, let alone pervasive and egregious judicial misconduct.

Second, defendant complains the court prohibited speaking objections during trial and allowed unreported sidebar discussions. Again, neither of these complaints reveals any judicial misconduct or bias at all. To the contrary, both of the challenged actions fall squarely within the court's broad discretion and inherent power to control the conduct of trials. (Pen. Code, § 1044.)

Third, defendant asserts the court demonstrated bias by denying the defense motion to strike portions of Wallace's expert testimony. However, as noted above, the court correctly overruled the defense objection. Additionally, even assuming error, an adverse evidentiary ruling alone does not normally prove or disprove judicial bias.

Fourth, defendant declares the court personally attacked defense counsel in front of the jury when: (1) the court interrupted counsel during jury selection; (2) the court said, "'Whatever that means'" in reference to one of defense counsel's questions; (3) the court stated defense counsel's examination of a witness "'wasn't off to a good start'" and told counsel to "'start over on it'"; (4) during defense counsel's questioning of a witness the court admonished him, "'Counsel I'm not going to tell you again, just ask questions. We don't want your thoughts and feelings'"; (5) the court stated on multiple occasions, "'No speaking objections'"; (6) outside the presence of the jury, the court stated to defense counsel, "'Now, back to this question. That is another clear example of offering evidence in front of the jury that's totally impermissible, without foundation, and I'm not going to have any more of that. Do you understand that? And maybe you thought it was funny. I don't'"; (7) the court once said, "'Counsel, I don't need any speaking objection. I told you a million times'"; (8) the court once said, "'Counsel, sustained. I'm not going to have any more of it. I've told you enough. I am warning you

one more time. Now ask a question appropriately'"; (9) once when defense counsel asked the court to admonish a witness, the court said, "'Counsel, I don't need any editorials'"; and, (10) the court once said, "'Counsel that was inappropriate and if I get any more of that, I'm going to have to deal with it.'"

Defendant casts these actions as impermissible disparagements of defense counsel, rather than proper exercises of the court's inherent authority to control the trial. Our review of the record presents a different picture, one in which the court appears to be the very model of judicial restraint and even temperament. Again none of these actions amounts to judicial misconduct or demonstrates bias against defendant or his counsel.

Fifth, defendant asserts, the "court interfered with the defense attempt to present its case by repeatedly cutting the hours requested by the defense for experts." Not true. The court authorized over $6,700 for defense investigators and around $40,800 for defense forensic accountants, rather than $3,621.20 and $19,588.10 as defendant claims. Additionally, the fact that one of the defense forensic accountants testified he had insufficient funds to complete a "full analysis" is not evidence of judicial bias.

5. Ineffective Assistance of Counsel

"When challenging a conviction on grounds of ineffective assistance, the defendant must demonstrate counsel's inadequacy. To satisfy this burden, the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance. It is particularly difficult to prevail on an *appellate* claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no

rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*People v. Mai* (2013) 57 Cal.4th 986, 1009 (*Mai*).)

In his direct appeal, defendant cites 11 instances of purported deficient representation as follows: (1) counsel failed to object to exhibit No. 116; (2) counsel failed to object to exhibit No. 106; (3) counsel failed to review exhibit No. 116; (4) counsel failed to adequately argue for sufficient funding for experts; (5) counsel failed to call a defense expert to define the term "'security'" or realize the definition of security was an element of a section 25401 offense; (6) counsel failed to submit a special instruction directing the jury to disregard the fact defendant is Iranian; (7) counsel did not understand the prosecution's burden of proof and failed to exhibit proper reverence during the proceedings; (8) counsel failed to impeach the prosecution's financial expert with one of the expert's responses to a prosecution question during his direct examination at the preliminary hearing; (9) counsel failed to impeach the prosecution's financial expert with a discrepancy in how much AGE money defendant directed to be made to family members; (10) counsel failed to submit a modification to CALCRIM No. 1862; and, (11) counsel failed to object to the prosecutor's argument as it related to exhibit No. 116 and defendant's income apart from AGE during the relevant time period.

We have reviewed each of these instances and conclude in all but one, defendant has not met his burden under *Mai* to show the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission; counsel was asked for a reason and failed to provide one; or there simply could be no satisfactory explanation. (See *People v. Vines* (2011) 51 Cal.4th 830, 876.) Also, in several instances, defendant has actually misrepresented the record.

The lone exception is counsel's purported misunderstanding of the prosecution's burden of proof and alleged failure to exhibit proper respect during the

proceedings. However, in neither of these instances was counsel's performance deficient. Defendant's record citations reveal defense counsel correctly characterized the prosecution's burden of proof during jury selection by stating, "The government has the entire burden of proof, and if it isn't met, it's the way the cookie crumbles."

Furthermore, while we emphasize the written record alone is of limited value for making this determination, there is nothing which suggests counsel's demeanor actually affected the outcome of defendant's trial. Thus, in his direct appeal, defendant has not met his burden of establishing either deficient performance or prejudice.

6. Instructional Error

Defendant contends the court erred by giving Special Instruction Nos. 2 and 7 because together they misstate the elements of section 25401. We do not agree.

When reviewing a claim of instructional error, this court determines """whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.'" (*People v. Frye* (1998) 18 Cal.4th 894, 957, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 420.) Jury instructions "may not be judged in artificial isolation, but must be viewed in the context of the overall charge." (*People v. Frye*, *supra*, at p. 957.) When jury instructions are correct statements of law but could be subject to erroneous interpretation, "the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (*Boyde v. California* (1990) 494 U.S. 370, 380.)

Special Instruction No. 2 told the jury: "The People have alleged that the defendant's failure to disclose certain orders (memorialized by documents admitted into evidence in this case) constitute material omissions under California securities law. . . . [¶] . . . [¶] You may consider these documents/orders only for purposes of determining whether the non-disclosure by defendants constitute material omissions with respect to fraud in the sale of securities and operating a fraudulent scheme. You must not

use these documents to infer guilt based on a propensity of the defendants to commit certain types of acts."

Special Instruction No. 7 stated: "A fact is material if there is a substantial likelihood that, under all the circumstances, a reasonable investor would consider it important in reaching an investment decision."

Defendant alleges Special Instruction No. 2 misstated the law, because the term "material omission" is not found in section 25401.[3] In addition, while defendant concedes Special Instruction No. 7 is a correct statement of the law, he claims it exacerbated the alleged misstatement in Special Instruction No. 2, because it allowed the jury to find a violation of section 25401 for an omission, by itself, regardless of whether that omission was material or not. We disagree with his premise and his conclusion.

It is true section 25401 does not cover "'simple nondisclosure.'" (*Butler, supra*, 212 Cal.App.4th at p. 420.) However, "a material omission," i.e., an omission to state a material fact, which under the circumstances made defendant's statements of material facts misleading, does satisfy the statute. (*Ibid.*) Hence, when viewed together, Special Instruction Nos. 2 and 7 correctly state the elements of section 25401.

Yet, even assuming a misstatement of law, there is no reasonable likelihood the jury applied Special Instruction Nos. 2 and 7 in the way defendant suggests, nor has he demonstrated the jury misunderstood or applied these instructions in a way that violated the Constitution. Consequently, we reject defendant's instructional error claims.

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[3] Section 25401 states: "It is unlawful for any person, in connection with the offer, sale, or purchase of a security, directly or indirectly, to do any of the following: [¶] (a) Employ a device, scheme, or artifice to defraud. [¶] (b) *Make an untrue statement of material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading*. [¶] (c) Engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person." (Italics added.)

7. Sentencing Error

Defendant assigns several errors to the sentence imposed by the court. We note preliminarily, a trial court has wide discretion in sentencing and its sentencing decision must be upheld absent a clear showing of an abuse of discretion. (*People v. Scott* (1994) 9 Cal.4th 331, 349.) Moreover, an objection to the sentence imposed is required in order to preserve the right to challenge a discretionary sentencing call on appeal, unless the trial court has imposed an unlawful sentence. (*Id.* at p. 356.)

Defendant did not object below to any of the claimed sentencing errors, and he has therefore waived the right to challenge the trial court's discretionary decisions. Nevertheless, we have reviewed each claimed error and conclude none has merit.

The 27-year sentence imposed is comprised of the following: (1) the high term of five years on count 1 for securities fraud, based upon the aggravating factor of planning and sophistication, and the imposition of concurrent rather than consecutive terms on counts 3, 9, 15, 35, and 51; plus (2) consecutive one-year terms (1/3 of the mid-term) for each of 19 other securities fraud counts (odd numbered counts 3-49, excluding counts 3, 9, 15, & 35); plus (3) a consecutive three-year term for the excessive taking enhancement. The court also imposed concurrent three-year terms for each securities fraud conviction in counts 3, 9, 15, and 35, and a concurrent five-year term for the fraudulent scheme conviction in count 51. Finally, the court imposed and stayed (Pen. Code, § 654) a two-year term for each grand theft conviction (even numbered counts 2-50).

First, defendant argues the sentences imposed on counts 11 and 12 should be concurrent with the sentences imposed on counts 13, 14, 15, and 16. We disagree.

As a threshold matter, we note the named victims in counts 11 through 16 are Li Yang Feng (counts 13-16) and his wife Jianling Wu (counts 11-12). Defendant incorrectly states the named victim in counts 15 and 16 is Li Yang Feng's daughter, Li Ming. Anyway, defendant's argument on counts 11 and 12 is unsupported by authority,

reasoned argument, or citations to the record. (*Islas*, *supra*, 210 Cal.App.4th at p. 128).

Defendant simply states, "Mr. Feng was the decision maker and his wife and daughter just did what he advised them to do with no other contact with the salesperson. [¶] At the time of sentencing, the court did not take into consideration the joint nature of counts 11-12 and counts 13-16 and did not impose a concurrent sentence as was done during the rest of the sentencing." But the jury and the court determined there were two separate victims, and the evidence supports those determinations. Thus, the court did not err or abuse of its sentencing discretion on counts 11 and 12.

Second, defendant asserts the court failed to explain its reasons for selecting the high term on count 1. Not true. The court stated, "As to the jury's findings of guilty in relation to count 1, the violation of [section] 25401, Christopher Dudek dating 12/14/06, the court has considered factors in aggravation. I'd specifically note there was a good deal of planning and sophistication in relation to this scheme. I'm also going to note it's the court's intention to sentence to some counts concurrent versus consecutive, for those reasons, the court sentences the defendant to the term of five years in state prison."

So the court stated two reasons for imposing the high term on count 1, and either is sufficient. Taking the second reason first, the fact that a defendant is convicted of other crimes for which consecutive sentences could be imposed but for which concurrent sentences are imposed is a valid circumstance in aggravation. (Cal. Rules of Court, rule 4.421(a)(7).) And in this case, the court could have imposed consecutive sentences, but instead imposed concurrent sentences on counts 3, 9, 15, and 35.

Similarly, the other stated reason for imposing the high term on count 1, planning and sophistication, is also a valid circumstance in aggravation. (Cal. Rules of Court, rule 4.421(a)(8).) Defendant acknowledges planning and sophistication is a valid aggravating factor, but argues it amounts to an improper dual use here because "the commitment of all of the charges here would require planning and sophistication."

This argument has no merit. As noted in the probation report, "The manner in which the crime was carried out indicates planning. The defendant started a company, hired people to solicit investors, and used professionally written contracts and professional sales techniques to defraud the victims. Such behavior is criminally sophisticated and indicative of professional expertise in committing fraud."

We agree with the probation report and the court. The level of sophistication and planning which defendant demonstrated in carrying out the crimes in this case was above that which would otherwise be necessary to commit those crimes, and thus we reject defendant's claim the court made improper dual use of these facts.

Third, defendant references *Cunningham v. California* (2007) 549 U.S. 270, and again argues the court failed to "state on the record which of the criteria listed in Penal Code section 1170, subdivision (b) apply and the court rules list criteria which may consider in aggravation." However, the record quoted above plainly shows defendant is mistaken. The court did not err by imposing the high term on count 1.

We acknowledge the severity of defendant's sentence, i.e., 27 years for white collar crime. Nevertheless, we are compelled to uphold it on the record presented. As noted in the probation report, defendant's crimes involved more than the 24 named victims, and the total number of victims is estimated to be between 80 and 120. Moreover, the Attorney General's investigator uncovered evidence of other fraudulent activities by defendant during the investigation of this case, and defendant has a history of fraudulent behavior. In the investigator's opinion, "defendant was so entrenched in a lifestyle dependent upon fraud that he would not desist illegal fraudulent activity were he to be released from custody." We agree. Besides, defendant never expressed remorse for his actions, choosing instead to complain to the probation officer about the hardships he suffered by being incarcerated while awaiting trial. Under these circumstances, the 27-year sentence imposed was not a clear abuse of the court's wide discretion.

8. Cumulative Error

Defendant claims the cumulative effect of the alleged prosecutorial misconduct, court error, and ineffective assistance of counsel denied him a fair trial. We have individually considered each alleged error, and found none that were prejudicial. In this five-week trial, which generated over 2,500 pages of reporter's transcript, any errors that occurred were surely harmless under any standard, whether considered individually or collectively. We find no deprivation of rights guaranteed under either the state or federal Constitutions. "Defendant was entitled to a fair trial, not a perfect one. [Citation.]" (*People v. Box* (2000) 23 Cal.4th 1153, 1214, overruled on other grounds in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10.) Defendant received a fair trial.

PETITION FOR WRIT OF HABEAS CORPUS

The petition for writ of habeas corpus which defendant filed in conjunction with his appeal expands upon his claims that prosecutorial misconduct and ineffective assistance of counsel deprived him of a fair trial. These expanded claims also lack merit.

As a reviewing court, "[w]e presume the regularity of proceedings that resulted in a final judgment [citation], and . . . the burden is on the petitioner to establish grounds for his release. [Citations.]" (*People v. Duvall* (1995) 9 Cal.4th 464, 474 (*Duvall*).) Furthermore, while we assume the petition's factual allegations are true (*In re Lawler* (1979) 23 Cal.3d 190, 194), if no prima facie case for relief is stated, the court will summarily deny the petition (*Duvall, supra,* 9 Cal.4th at p. 474).

"'[A]ll presumptions favor the truth, accuracy, and fairness of the conviction and sentence; defendant thus must undertake the burden of overturning them.' [Citation.]" (*Duvall, supra,* 9 Cal.4th at p. 474.) "To satisfy the initial burden of pleading adequate grounds for relief . . . . [t]he petition should both (i) state fully and with particularity the facts on which relief is sought [citations], as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations. [Citations.]

'Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing.' [Citation.]" (*Ibid*.)

Defendant's petition included copies of the following exhibits: (1) an unsigned "Declaration of Mahmoud Karkehabadi," (2) a "Summary of Lenders," (3) a "Summary of Payments and Deposits Associated with Karkehabadi Family," (4) a "Distribution Revenue to AGE Citibank 3365," and (5) an "AG Discovery Documents referred to in Memorandum but not included in Exhibit 116." Upon filing, defendant's counsel stated, "As soon as I get an opportunity to get this declaration signed, I will submit the signed copy as a supplement to this Petition." It appears no signed copy was ever submitted. Even so, we will treat the declaration as if it was properly verified.

Most of the defendant's writ claims are not supported by the exhibits to the petition or by the evidence in the trial record. Regarding prosecutorial misconduct, defendant makes several claims, which are really nothing more than repetitions of his appeal complaints about what evidence and which witnesses the prosecution presented at trial, including unsupported allegations the prosecutor knowingly presented false testimony and improperly accused defendant of lying during the sentencing hearing. Defendant failed to substantiate these categories of prosecutorial misconduct on appeal, and fares no better by supplementing the record with the exhibits attached to his petition.

"When the basis of a challenge to the validity of a judgment is constitutionally ineffective assistance by trial counsel, the petitioner must establish either: "(1) As a result of counsel's performance, the prosecution's case was not subjected to meaningful adversarial testing, in which case there is a presumption that the result is unreliable and prejudice need not be affirmatively shown [citation]; or (2) Counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors and/or omissions, the trial would have resulted in a more favorable outcome." (*In re Visciotti* (1996) 14 Cal. 4th 325, 351-352.)

And critically important to the case now before us, "In demonstrating prejudice, however, the petitioner must establish that as a result of counsel's failures the trial was unreliable or fundamentally unfair. [Citation.] 'The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' [Citation.]" (*In re Visciotti*, *supra*, 14 Cal.4th at p. 352.)

Defendant's declaration sets out five instances of allegedly deficient performance by his trial attorney: (1) conflict of interest, (2) insufficient trial preparation and attention, (3) submission of an improper list of questions from cocounsel, (4) denial of the right to testify, and (5) failure to provide discovery. We will examine each.

First defendant states, "Prior to trial, I told my attorney that I wanted to request a different trial judge. He told me that he knew this judge and had, in fact, house-sat for the judge. This prior relationship was never disclosed in open court." But defendant fails to explain how the described situation prejudiced the outcome of his case. Further, because we have already rejected defendant's claims of court bias, and nothing in the appellate record or petitioner's exhibits suggests any conflict of interest on the part of trial counsel, we conclude defendant has failed to demonstrate counsel's relationship with the trial judge, if any, adversely affected the outcome of the trial.

Second, defendant claims his attorney "often appeared in court unprepared and was distracted by texts," and it took "days of trial before [counsel] realized that his evidence notebook was numbered differently than the prosecutor's and the court's evidence books." Yet again, defendant has not explained how this purported lack of preparation and distraction, or this seemingly trivial confusion over the numbering of the prosecution exhibits, rendered defendant's trial fundamentally unfair.

Third, defendant complains his attorney handed him a list of questions prepared by Cho's attorney concerning defendant's knowledge of Cho's other businesses.

Defendant says he answered the questions, but it appears none of this evidence was presented at trial. Thus, defendant fails to show prejudice as the result of this conduct.

Fourth, defendant asserts his attorney failed to prepare him to testify and rested without calling defendant as a witness. These claims implicate defendant's fundamental rights even if counsel believed testifying to be against defendant's interest, and failure to adequately prepare an insistent defendant to testify can constitute ineffective assistance of counsel. (*People v. Nakahara* (2003) 30 Cal.4th 705, 717; *People v. Cunningham* (2001) 25 Cal.4th 926, 1031-1032.) However, we are once again faced with asserted errors in the absence of any explanation of how those errors, proven or not, caused an injustice or affected the outcome of his trial. Thus, even assuming the truth of defendant's assertions, he once again fails to establish prejudice.

Fifth, defendant claims his attorney failed to provide him with "discovery or any other business documentation seized from my home or subpoenaed from banks" and he suspects his "attorney never required the production of those documents." These claims also suffer from a fatal lack of explanation or showing of prejudice.

In sum, none of defendant's expanded claims of prosecutorial misconduct or ineffective assistance of counsel, even if assumed to be true, state a prima facie case for relief. Thus, defendant's petition for writ of habeas corpus must be denied.

DISPOSITION

The judgment is affirmed. The petition for writ of habeas corpus is denied.

THOMPSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.